Supreme Court, U.S.
FILED
DEC 29 2003
OFFICE OF THE CLERK

(20)

No. 02-1606

In The

Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION, *Petitioner*,

v.

PAMELA L. HOOD, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

Brief in Support of Respondent for *Amici Curiae* Professors Susan Block-Lieb, Erwin Chemerinsky, Margaret Howard, Kenneth N. Klee, Jonathan C. Lipson, Bruce A. Markell, Lawrence Ponoroff and Elizabeth Warren

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are law professors who teach and write in the areas of bankruptcy and constitutional law.[2] *Amici* are not predisposed to debtors or creditors or federal or State governmental bodies. They file this brief in support of the decision below because it offers the opportunity to establish a uniform approach to the problem of State assertion of sovereign immunity in bankruptcy cases – a problem that currently plagues the bankruptcy system.

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *Amici* file this brief with the written consent of all parties, which are appended hereto. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] Susan Block-Lieb is a Professor of Law at Fordham University Law School. Erwin Chemerinsky is the Syndey M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California. Margaret Howard is a Professor of Law at Washington & Lee Law School. Kenneth N. Klee is a Professor of Law at the University of California at Los Angeles School of Law. Jonathan C. Lipson is an Associate Professor of Law at the University of Baltimore School of Law. Bruce A. Markell is the Doris S. and Theodore B. Lee Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Lawrence Ponoroff is Dean and Mitchell Franklin Professor of Law at Tulane Law School. Elizabeth Warren is the Leo Gottlieb Professor of Law at Harvard Law School.

SUMMARY OF ARGUMENT

Amici support the Debtor's argument based on constitutional history and case law. In addition, *amici* emphasize the significance of the *in rem* nature of bankruptcy cases and especially of the discharge. Sovereign immunity has never applied to *in rem* actions (unless the *res* is in the possession of the State or other sovereign asserting immunity).

The *res* in a bankruptcy case is often thought of as the property of the estate, but the *res* is also the debtor. It is the bankruptcy court's jurisdiction over the debtor that historically provided the jurisdiction to grant the debtor a discharge, initially from debtors' prison, even though the court had no *in personam* jurisdiction over the State or State official who imprisoned the debtor. The same *in rem* jurisdiction over the debtor provides jurisdiction today for bankruptcy courts to grant debtors discharges from their debts, even if no personal jurisdiction is obtained over the creditors. This *in rem* jurisdiction provides a jurisdictional basis for a bankruptcy court to determine that a debtor has established such undue hardship that student loan obligations owed to States should be discharged, without impinging on the States' sovereign immunity.

In rem jurisdiction is sufficient to affirm the Sixth Circuit's opinion in this case. Recognition of such jurisdiction does not threaten to subject States to suits for affirmative monetary liability that could not rest on the bankruptcy court's *in rem* jurisdiction.

Finally, *amici* add their perspectives on the intersection of sovereign immunity and the Bankruptcy Clause of the Constitution. We emphasize three fundamental points: First, Hamilton's analysis, followed by the Sixth

Circuit below, is consistent with *Atascadero*, *Seminole* and *Florida Prepaid*, because it rests entirely on very specific *text* of the Constitution, not on the plenariness of Congress' powers under Article I. Second, the uniformity provision of the Bankruptcy Clause grants a power that extends beyond superseding of inconsistent State legislation, and beyond the geographic uniformity advocated by the Tennessee Student Assistance Corporation ("TSAC") and its *amici*. The Framers of the Constitution understood that bankruptcy was different than other Article I powers, and that uniformity entailed the power to restrict and totally alienate State sovereignty. Finally, whether or not the Framers intended that bankruptcy laws would discharge State claims, they did intend to abrogate sovereign immunity so as to make a discharge enforceable against State bodies. The federal court order discharging the debtor and ordering the debtor's release from state debtors' prison by *habeas corpus* would have conflicted with principles of State sovereign immunity but for the constitutional abrogation.

ARGUMENT

I. The States Seek to Control the Discharge of Their Claims.

A. This Case Concerns Discharge and Dischargeability of State Claims.

This case arises in the context of discharging a student loan on grounds of hardship. 11 U.S.C. § 523(a)(8). In general, the Bankruptcy Code requires the bankruptcy court to grant individual debtors and reorganizing entity debtors a discharge of most of their debts (with certain exceptions), unless the debtors committed certain prohibited acts. 11 U.S.C. §§ 523, 727, 1141, 1228, 1328. The bankruptcy court enters a discharge order after notice is

given to all listed creditors and a period for objections expires if no complaint objecting to a discharge is made, and in a reorganization case after a plan also has been confirmed (chapter 11) or substantially completed (chapter 12 family farmer or chapter 13 wage earner). *Id.* A State or other creditor can file a complaint objecting to dischargeability of a particular debt on specific grounds, such as the debt having been obtained by fraud, without objecting to an overall discharge. 11 U.S.C. § 523(a); Bankruptcy Rule 4007.

If no creditor files a complaint objecting to discharge or dischargeability or the relief requested in such a complaint is denied, the court enters a general discharge order (subject to revocation under certain procedures). *See* 11 U.S.C. § 523(c). Since 1976, however, government-guaranteed student loans have been excepted from a general discharge unless another order is entered finding the student loan debt will impose undue hardship on the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8). As a practical matter, only the debtor will request such relief, not the creditor. The current Bankruptcy Rules require that all determinations of the dischargeability of a particular debt –whether brought by a creditor or debtor – be litigated in adversary proceedings under the Federal Rules of Civil Procedure incorporated into the Bankruptcy Rules, commenced by a complaint and summons. Bankruptcy Rules 7001(6), 7003. It is the use of a summons that the States find offensive. The same trial, discovery and other procedural rules would apply if the dispute was commenced by a motion instead of a summons. Bankruptcy Rule 9014.

The Bankruptcy Code provides that a discharge order operates as an injunction against any action or lawsuit to collect, recover or offset a discharged debt as a personal liability of the individual debtor, and voids any judgment on such a debt. 11 U.S.C. § 524(a). TSAC acknowledges it

may not disobey a valid federal law on sovereign immunity grounds (TSAC Br. at 9). It suggests, however, that the only means to enforce a discharge would be either by a federal government suit against the State (citing no statutory authority or procedure for such a suit, which does not exist), or by an *Ex parte Young* individual suit against a State officer (likely unavailable if a prior dischargeability determination is needed), or by an individual defense in any collection suit the State might bring (which debtors often cannot afford to defend, or do not defend in the belief that the debt has been discharged) (*Id.* at 29-30).

In addition to restricting enforceability of a discharge order, TSAC says the bankruptcy court cannot even enter a student loan hardship dischargeability order without State consent. TSAC claims the only appropriate means to obtain such an order would be through a defense in a possible collection suit, where the state court could decide on applicable hardship standards (*Id.* at 30). The state courts lack bankruptcy courts' expertise from routinely deciding such issues, and lack of uniformity is likely to result. If a state court took an unduly narrow view of the hardship rule, protecting State coffers, TSAC says the only remedy would be by a writ of certiorari to this Court (*Id.*), an unlikely scenario when the debt is a few thousand dollars and the debtor has at least arguable hardship.

TSAC's theory means that until and unless a State chooses to sue and thus enables a hardship defense to be asserted, there would be no hardship student loan discharge, and accordingly no violation of federal law prohibiting enforcement efforts. Debtors would be precluded from obtaining the benefit of their federal rights to student loan hardship discharges under the Bankruptcy Code, and would be limited to seeking relief under state regulations for temporary postponement of payments and full release of

their debts only in the event of their deaths or permanent disability (*Id.* at 29 n. 8; Council of State Governments *amici* Br. at 28-30). This conflicts with the fresh start policy that is at the heart of the Bankruptcy Code.

B. The States Overreach, With Widespread Damage.

This case is not solely about a single hardship student loan discharge. Its consequences are far broader. In fiscal year 2003 alone, 1,661,996 bankruptcy cases were filed, primarily by individuals. Admin. Ofc. U.S. Courts News Release (Nov. 14, 2003). When corporate or partnership entities file Chapter 7 liquidation cases, those entities cease to exist as a practical matter, but individual Chapter 7 debtors and debtors reorganizing under Chapter 11, 12 or 13 continue to interact with their creditors. If a State or any other creditor can opt out of the bankruptcy process and continue collecting discharged debts, it is grossly unfair to the other creditors and disruptive and damaging to the debtor, let alone threatening the outright denial of that debtor's federal right to a student loan hardship discharge.

State evasion of bankruptcy jurisdiction thwarts a vast number of wage-earner and reorganization plans, and impairs individual discharges, because States are creditors in the vast majority of bankruptcy cases. States may have claims based on contract, as in *Hood*, or they may have tax claims, or tort claims resulting from accidents with State-operated vehicles. The States essentially take the position that their claims cannot be discharged effectively without their consent, since they say debtors cannot sue them to stop their collection efforts. The States' position logically extends to not being bound by the automatic stay either. States could continue pursuing claims during a bankruptcy case whenever they assert immunity from debtors' litigation to enforce the

stay. They could, on their theory, commence collection suits in state court. They could also offset accounts and tax refunds and garnish debtors' wages before any injunction could be sought against a State official, and without debtors having recourse for such stay violations.

The States' leverage is unfair *vis-a-vis* other creditors, including the federal government, which is also a creditor in most bankruptcy cases. Tax payments are usually owed to the Internal Revenue Service, and there are often Small Business Administration loans or, as in *Hood*, Department of Education ("DOE") loans. While TSAC is seeking to avoid participating in Ms. Hood's bankruptcy case, the federal DOE is left as the defendant in her hardship discharge adversary proceeding, and it is bound by bankruptcy court rulings.

Indeed, the federal government may be particularly disadvantaged by the States' claims of immunity in bankruptcy cases when debtors have both State and federal student loans. Some courts permit a partial hardship discharge, discharging these loans down to a level the debtor can pay. *See In re Hornsby*, 144 F.3d 433, 439-40 (6th Cir. 1998); *In re Saxman*, 325 F.3d 1168, 1173-75 (9th Cir. 2003). If the State is able to assert sovereign immunity in such a case, holders of federal loans will bear the full brunt of the discharge instead of having all student loans reduced *pro rata*.

II. Bankruptcy Laws Apply and Are Enforced Differently From Other Article I Laws, Requiring a Different Analysis of Sovereign Immunity.

TSAC and its *amici* argue that the Bankruptcy Code is no different from other Article I legislation, and

accordingly the Court's *Seminole Tribe* rejection of *Union Gas* and the *Atascadero* dissent means that, when ratifying the Constitution, only the power to legislate was alienated, not the power to enforce bankruptcy laws. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 277-78 (1985).

In none of those cases, however, did the Court rule on the Bankruptcy Clause, with its uniformity provision and unique history and procedure. The Debtor's argument here is distinct from the decision in *Union Gas* and the *Atascadero* dissent because, like Hamilton's analysis in THE FEDERALIST NOS. 32 and 81, it hinges on the specific text of the particular constitutional provision involved, *i.e.* the Bankruptcy and Naturalization Clause. The Court has not previously considered the Debtor's analysis, which is limited to this Clause, and does not apply to other Article I clauses such as the Commerce Clause.

Bankruptcy statutes are also different in a particularly compelling way from the tax, commerce and other Article I laws resolved in the Court's recent sovereign immunity cases. The substantive provisions of bankruptcy statutes are not regulatory laws, and do not apply to the populace at large or mandate or proscribe any action in the course of everyday affairs. Bankruptcy laws only apply in conjunction with *in rem* bankruptcy cases -- the federal government supplies the forum and standards for resolution of private debt matters. Unlike federal regulatory statutes that are enforceable by federal authorities, bankruptcy discharges and the automatic stay are enforceable only by debtors and creditors, and only in the context of specific bankruptcy cases, not by United States Attorneys or federal agencies in federal or state court suits. If private parties cannot enforce such bankruptcy law provisions through bankruptcy court proceedings in specific

debtors' bankruptcy cases, no one can. Alienation of sovereign authority to enact bankruptcy legislation, without ceding concomitant authority over bankruptcy proceedings too, would have been meaningless.

Certainly, the Framers of our Constitution expected that bankruptcy laws, like other federal laws, would be enforceable. *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982) ("The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States"). This Court has recognized that State sovereign immunity does not mean that States cannot be compelled in court to comply with federal statutes. In cases arising under other Article I laws, the federal government can sue States to enforce those laws. *See, e.g., Alden v. Maine*, 527 U.S. 706, 755-56 (1999); *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (Americans With Disabilities Act could not be the subject of individual lawsuits against States but was still enforceable against States in federal court by federal government). Bankruptcy is different.

While TSAC and its *amici* concede that Bankruptcy Code provisions and orders bind them, they eviscerate the law and student loan hardship discharge rights by preventing the bankruptcy court from issuing a hardship ruling. The States say debtors suffer no harm because they can just raise a discharge defense in state court. But that has three implications: First, if States prevent the hardship dischargeability procedure from taking place, there will be no hardship discharge to assert as a defense to student loan debt, and state courts may or may not undertake a hardship dischargeability determination themselves. Second, if the state court declines to rule, the debtor may have no recourse. Neither the bankruptcy court nor this Court could require state courts to make such determinations. *See Printz v.*

United States, 521 U.S. 898, 925 (1997) (federal government may not compel States to implement or enforce federal laws). Under *Alden*, even debtors whose debts have been discharged might not be able to stop discharge violations through their own lawsuits in state court. *Alden*, 527 U.S. at 754. Third, if States undertake collection efforts and recover on debts encompassed by a general discharge, debtors can do nothing until and unless the State chooses to file a lawsuit and the debtor (assuming she has the funds) hires an attorney and asserts her right to a hardship discharge as a defense.

TSAC and its *amici* suggest that debtors could rely on *Ex parte Young* lawsuits to enforce their discharges, but that would not stop a State from setting off discharged tax debts against a tax refund, or seizing a bank account, which could be accomplished before the debtor could sue to stop it. *Ex parte Young*, 209 U.S. 123 (1908). An *Ex parte Young* suit also may not permit the debtor to determine entitlement to a discharge. Until student loan hardship is proved, there is no discharge violation to remedy through such a suit, according to the Bankruptcy Counsel for the National Association of Attorneys General. *See* Karen Cordry, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief: A Response*, 77 AM. BANKR. L.J. 23, 49-53, 57 (2003). *Ex parte Young* lawsuits are also difficult and expensive for impecunious debtors.

Federal bankruptcy law, enshrined in our Constitution, is not so hobbled. Where there is a federal right, there must ordinarily be a remedy to enforce that right. *Marbury v. Madison*, 1 Cranch 137, 162 (1803). Bankruptcy law is enforceable through the orders of the federal court having jurisdiction over the bankruptcy debtor, because the Framers of the Constitution expressly delegated that

sovereign power to th e federal government, and because bankruptcy jurisdiction is *in rem*.

III. Bankruptcy *In Rem* Jurisdiction Binds States, And Also Limits Their Exposure.

Sovereign immunity is inapplicable to *in rem* determinations. "[T]he Eleventh Amendment does not bar the jurisdiction of a federal court over an *in rem* admiralty action where the *res* is not within the State's possession." *California v. Deep Sea Research*, 523 U.S. 491, 494-95 (1998); *see also United States v. Judge Peters*, 9 U.S. 115, 139 (1809) (contention that State has title to *in rem* property does not prevent federal court from looking into the assertion and examining validity of the title).[3]

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[3] In *Missouri v. Fiske*, 290 U.S. 18, 27-28 (1933), the Court stated that the fact that a suit was *in rem* or *quasi in rem* furnished no ground for issuance of process against a non-consenting state. *Missouri v. Fiske*, 290 U.S. 18, 28 (1933). That case was implicitly overruled by *Deep Sea Research* on an *in rem* exception to sovereign immunity to the extent the *res* in *Fiske* might be deemed to have been in the possession of the federal court rather than the State. The *Fiske* federal court first acquired *quasi in rem* jurisdiction over shares of stock in the possession of probate trustees when one of a decedent's children/beneficiaries sued the trustee for an accounting and determination of rights in certain shares of stock, and the other children and widow (but not the State) were joined as defendants. *Fiske*, 290 U.S. at 22. The State later commenced a separate suit in the probate court to determine whether the stock should be included in the widow's estate, and subject to inheritance taxes. *Id.* at 23-24. The children then filed a supplemental complaint in their federal suit to enjoin the State from prosecuting in the probate court. The State was not a party to the *quasi in rem*

This Court has repeatedly recognized that bankruptcy is an *in rem* proceeding. *E.g., Hanover Bank v. Moyses*, 186 U.S. 181, 191-92 (1902); *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275-76 (1915); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Katchen v. Landy*, 382 U.S. 323, 329 (1966). The *res* is not merely the debtor's assets or the bankruptcy "estate," although the assets are part of it. *Gardner*, 329 U.S. at 574. Rather, the *res* encompasses the bankrupt debtor personally. This Court so recognized in *Moyses*, where Max Moyses' discharge was upheld against a creditor that had not been served with process or appeared. *Moyses*, 186 U.S. at 182-83. The Court held that bankruptcy proceedings are *in rem* with respect to the debtor. *Id.* at 192. The Court recognized that "[t]he subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities as well as to distribute his property." *Id.* at 188. *See also Bailey*, 239 U.S. at 275-76 ("The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and disposition of his estate"). The debtor as the *res* was even more evident when the Constitution was adopted,

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federal declaratory action except by a special appearance to request the stock be held pending a decision in the probate action (which would also have been *in rem*). *Id.* In *Deep Sea* this Court distinguished the principal cases on which *Fiske* relied as cases where the *res* was in the possession of the State. 523 U.S. at 503-07. In *Fiske*, the stock was possessed by the state probate trustees. 290 U.S. at 22. In contrast, the *res* in a bankruptcy case is in the federal bankruptcy court, like the federal court *res* in *Deep Sea*. Further, *Fiske* suggested that the federal court decree could be binding on the State in the probate court suit in any event, despite the State's assertion of immunity. *Id.* at 29.

because it was the debtor personally who was freed by federal court order from state debtors' prison by a bankruptcy adjudication. It is still the person of the debtor who is the *res*, and receives a discharge.

A. Bankruptcy *In Rem* Proceedings Bind All Parties With Notice.

An *in rem* proceeding binds all parties with notice of it, whether or not they file claims, and whether or not they are personally served with process. *Moyses*, 186 U.S. at 192; *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933). Filing a claim results in a waiver of sovereign immunity by a State with respect to claims and counterclaims by a debtor or trustee based on state or federal law, at least insofar as those claims arose out of the same transaction or occurrence which is the subject of the State claim, and up to the amount of the State claim. *Gardner*, 329 U.S. at 574 (State claim waives immunity respecting adjudication of the claim); *Katchen*, 382 U.S. at 329-335 (counterclaim to recover avoidable preference); *United States v. Shaw*, 309 U.S. 495, 502, 504 (1940); 11 U.S.C. § 106(b).

Once notice is given, States as well as other parties are bound by bankruptcy court rulings with respect to their claims against a debtor, even if they decline to file a claim or otherwise to participate and be heard. *Moyses*, 186 U.S. at 192; *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 102 (1989) ("a State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes [citations omitted], but would not be subjected to monetary recovery" by the trustee or debtor). This Court has repeatedly affirmed orders by bankruptcy courts that eliminate State claims, despite State objections. *See Van Huffel v. Harkelrode*, 284 U.S. 225, 228 (1931) (federal court could alter a State's lien rights in a

bankruptcy case without the State's consent; no reason why "state taxes should be deemed to have been excluded from the scope of this general [bankruptcy] power to sell free from [State] encumbrances"); *Irving Trust Co.*, 288 U.S. at 329 (affirming decision to bar State's claim); *Gardner*, 329 U.S. at 572, 578 ("the reorganization court had jurisdiction over the proof and allowance of the tax claims and . . . the exercise of that power was not a suit against the State.... The constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled").

B. Bankruptcy *In Rem* Jurisdiction Sets a Protective Limit on Permissible Litigation Against States.

The current bankruptcy laws authorize a broad, pervasive reach over all litigation affecting the bankruptcy estate. 28 U.S.C. § 1334. This is efficient and cost-effective, but it requires that Article III district courts delegate to bankruptcy courts the authority to hear bankruptcy proceedings. 28 U.S. C. § 151; *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Bankruptcy laws still distinguish between "core" jurisdiction over such fundamental bankruptcy precepts as the automatic stay, claims resolution, and the discharge, and "related to" jurisdiction over peripheral matters affecting the bankruptcy case. 28 U.S.C. § 157(b), (c). The predecessor Bankruptcy Act of 1898 similarly distinguished between "summary" jurisdiction over property in the actual or constructive possession of the bankruptcy court and matters of an administrative character, and "plenary" jurisdiction by consent over some other litigation. *Katchen*, 382 U.S. at 327, 329; *Northern Pipeline*, 458 U.S. at 53-54.

Core *in rem* bankruptcy jurisdiction does not encompass a lawsuit to collect money from a state treasury or from any other party owing money *to* a debtor on contract, tort, or other non-bankruptcy grounds. *See United States v. Nordic Village*, 503 U.S. 30, 38-39 (1992) (bankruptcy *in rem* jurisdiction does not extend to monetary recovery unless it is recovery of particular dollars constituting the *res*). Rather, core *in rem* jurisdiction is limited to adjudicating claims based on money owed *by* a debtor to a State or other creditor, whether it be a student loan or a tax or contract debt. This is the fundamental, and principled, distinction between *in rem* bankruptcy litigation and private suits for damages to recover money from state governments. The Framers of the Constitution were concerned about citizens suing States to collect war bond debts those States owed *to* the bondholders. The Framers were willing, however, to allow a federal discharge of a bankrupt debtor from state debtors' prison on account of debt owed *by* that debtor to creditors.

The Plan of the Convention provided for abrogation of sovereign immunity over core bankruptcy claims against a debtor, not over independent causes of action by debtors against other parties under state or other federal laws. Bankruptcy *in rem* jurisdiction is similar in that regard, and that constraint insures that a decision for the debtor in this case will not be unduly expansive against States. *In rem* jurisdiction does not threaten the basic purpose of sovereign immunity, which is to permit the States to pay their debts in their own way; it does not threaten the Court's recent case law.[4]

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[4] The Court need not decide in this dischargeability case whether every type of proceeding to collect from a State would be outside the scope of bankruptcy *in rem* jurisdiction. Assertions that a state agency must turn over bankruptcy

C. Discharge Determinations Should be Made by the Bankruptcy Court Administering Claims Against the Debtor.

Determining dischargeability of claims is one aspect of administering claims against the estate, which is grounded on *in rem* jurisdiction. Claims administration encompasses deciding whether claims are allowed or disallowed, which assets must be devoted to particular claims, what order of priority is applicable, and whether the balance not paid from the *res* is collectable outside of the bankruptcy proceeding. This Court has acknowledged that claims administration is part of *in rem* proceedings. *See Gibbons*, 455 U.S. at 466; *Moyses*, 186 U.S. at 186; *see Nordic Village*, 503 U.S. at 36 (Bankruptcy Code § 505(c) "would permit a bankruptcy court to determine the amount and dischargeability of an

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estate assets in its possession under Bankruptcy Code § 542 may be within core *in rem* bankruptcy jurisdiction. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). Surrender of a preferential payment under § 547, to enable equitable distribution to all creditors, may also be within core *in rem* bankruptcy jurisdiction, as it is a purely Bankruptcy Code-based entitlement like turnover under § 542. Recovery of preferences was considered outside such core, or "summary" jurisdiction under the predecessor Bankruptcy Act, but is included among core jurisdiction under the procedural provisions related to the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(F). *See Katchen*, 382 U.S. at 329-35 (preference recovery under Bankruptcy Act litigated in plenary lawsuit, but there is *in rem* summary jurisdiction over preference as offset to claim litigated in summary claims allowance proceedings).

estate's liability to the Government, such as unpaid federal taxes").

The States want to change that system. They want full control over enforceability of the discharge, and the determination of student loan hardship debt dischargeability, by choosing whether and when to start a state court collection suit. *See* Jonathan C. Lipson, *Fighting Fiction with Fiction: The New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH U. L. Q. 1271, 1291-1309 (2000). The States can harass debtors with dunning notices and credit report impairment in disregard of federal law in the meantime without ever starting any suit in which the debtor can be heard. States can seize bank accounts, garnish wages, and setoff tax refunds.

This change urged by the States would be an unwise setback. In 1970, Congress explicitly abandoned the approach under which debtors' ability to plead a discharge as an affirmative defense in a collection suit was the primary means to effect the discharge, because that system permitted creditors to harass debtors, and often to get default judgments because debtors could not afford a defense or thought they did not need to appear in light of their discharges. *See* James Wm. Moore, Editor-in-Chief and Lawrence P. King, Editor-in-Chief--Revision, 1A COLLIER ON BANKRUPTCY ¶ 17.28A, at 1735-37 (14th ed. 1978). For just these reasons, Congress added Section 14f to the former Bankruptcy Act to provide a federal injunction against efforts to collect discharged debts, and to give the bankruptcy court primary jurisdiction to determine what debts were discharged. H. REP. NO. 91-1502, 91st Cong., 2d Sess. 1-2 (1970). *Id.*

The Commission on the Bankruptcy Laws of the United States, which studied bankruptcy law and practice

extensively, then wrote the draft of what became the current Bankruptcy Code, recognized this problem as well:

> Congress became convinced that relegating a discharged bankrupt to other courts for vindication of his discharge resulted so often in the loss of its intended benefit and frustration of the objective of the federal legislation that jurisdiction of determining the effect of a discharge was given to the bankruptcy court.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. DOC. NO. 137, 93d Cong., 1st Sess. (1973), *quoted in* H.R. REP. NO. 95-595 at 46-47 (1978).

The Court should not again enable States to engage in such abusive practices. Further, it is a fundamental precept that the court with jurisdiction over the *res* determines the applicability of limitations and restrictions on claim entitlement to payment. The bankruptcy court has exclusive jurisdiction in that regard. *Gardner*, 329 U.S. at 577; *Irving Trust*, 288 U.S. at 332. Bankruptcy courts should be the source of discharge determinations as the Bankruptcy Code provides, not state courts. The Bankruptcy Code's injunction against collection efforts on discharged debts should not be undercut. 11 U.S.C. § 524(a).

D. Adversary Rules Cannot Alter Bankruptcy Jurisdiction Under the Bankruptcy Laws.

Certainly, States are entitled to notice and an opportunity to be heard in proceedings where aspects of their claims will be determined, including discharge of those claims. Giving them notice does not transform such proceedings into individual lawsuits against the State. *Irving Trust*, 288 U.S. at 331; *Gardner*, 329 U.S. at 572.

The current Bankruptcy Rules provide for a summons and adversary complaint to be served on the creditor whose claim is the subject of the dischargeability proceeding. Bankruptcy Rules 4007, 7001(6), 7004. This is a heightened notice procedure, intended to give State and other defendants explicit warning to focus on the proceedings because of the potential impact on their claims. *See In re Hood*, 319 F.3d 755, 759 (6th Cir. 2003) (discussing 1976 change). But Bankruptcy Rules cannot abridge rights under the Bankruptcy Code. 28 U.S.C. § 2075. States cannot avoid the consequences of *in rem* federal discharge rulings because of a procedural rule drafted to maximize the protection of creditors.

There are several ways in which these fundamental principles can be resolved in dischargeability litigation concerning State claims:

- The summons and adversary complaint procedure can be recognized as merely a significant form of notice that aspects of the debtor's obligation owed *to* a State will be determined by the court. *See Cohens v. Virginia*, 19 U.S. 264, 411 (1821) ("The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party [in that appellate case, that the record is transferred into another

Court] where he may appear, or decline to appear, as his judgment or inclination may determine."). In *Cohens*, the Court held that sovereign immunity did not apply to the appeal of an action involving the State because nothing was demanded *from* the State. The appellate court would re-examine the judgment and reverse or affirm as if the State had appeared and argued its case. Similarly, in dischargeability litigation, even if the defendant chooses not to appear, the court must exercise sound judicial discretion in entering a non-monetary default judgment. Bankruptcy Rule 7055, incorporating Fed.R.Civ.P. 55(b)(2); *see* 10A Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE CIVIL § 2685 at 30-41 (1988). *See also Bank of Marin v. England*, 385 U.S. 99, 102 (1966) (bankruptcy party in interest entitled to notice reasonably calculated to apprise it of the pendency of the action); *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 489-90 (1988) (notice by mail service in probate proceeding is sufficient to meet requirement of actual notice). Having received due notice, the State would be bound even if it did not participate.

- A proceeding to determine entitlement to discharge of a claim could be recognized as not being a lawsuit at all, but an aspect of claim adjudication not subject to State immunity, along with determining the validity and amount of the claim, and method of payment. *Gardner*, 329 U.S. at 572-73, 576; *Moyses*, 186 U.S. at 186; *Gibbons*, 455 U.S. at 466. The proceeding retains its *in rem* character, and the State is not obliged to respond.

- The Court could hold that dischargeability litigation, like claims allowance and stay violation litigation, should be commenced by a motion instead of a summons and adversary complaint. *Chandler v. Oklahoma*, 251 B.R. 872 (B.A.P. 10th Cir. 2000); *In re Collins*, 173 F.3d 924, 929 (4th Cir. 1999) (dischargeability of state claim commenced

through motion to reopen procedure). This Court held long ago in *Moyses* that "If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process personal notice is not essential to the binding force of the decree." *Moyses*, 186 U.S. at 191-92.

This Court has repeatedly held that a bankruptcy discharge is enforceable against non-participating State creditors. *Hoffman*, 492 U.S. at 102; *Irving Trust*, 288 U.S. at 333; *Moyses*, 186 U.S. at 188. Assertion of sovereign immunity on account of procedural rules cannot be allowed to circumvent that enforcement, or prevent the court with jurisdiction over the debtor as the bankruptcy *res* from determining entitlement to that discharge or any other aspect of claim administration.

IV. The American People Allocated Bankruptcy Jurisdiction to the Federal Government to Bind State Prison Authorities.

These *amici* join and support the briefs filed by the Debtor and *amicus* legal historian Prof. Bruce Mann in their analysis of the historical framework in which the Bankruptcy Clause was drafted, and its import in interpreting that clause, and also cite the Court to the thorough analysis in an article by Hon. Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 139, 174 (2003) ("Haines"). This brief expands on three points referenced in their briefs with respect to the surrender of immunity in the Plan of the Convention.

A. Bankruptcy Uniformity is Not Merely Geographical, But Restricts Sovereign Immunity.

The Bankruptcy Clause of the Constitution grants Congress the power "to establish…uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. This Court has interpreted this uniformity language in several contexts, none bearing on sovereign immunity, except to the extent that Chief Justice Marshall observed in the first interpretation of the Bankruptcy Clause that "[t]he peculiar terms of the grant [of bankruptcy power] certainly deserve notice" because "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States." *Sturges v. Crowninshield* 17 U.S. (4 Wheat.) 122, 193-94 (1819).

In *Vanston Bondholders* Justice Frankfurter said that one type of uniformity was geographic. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (the uniformity provision "is a requirement of geographic uniformity.") (Frankfurter, J., concurring). But he did not foreclose other types of uniformity, and the majority in *Vanston Bondholders* reasoned that federal courts must enforce federal bankruptcy law, not just treat state laws uniformly. In *Moyses*, the Court held that uniformity permitted debtors to use exemptions that varied by state, which it found to be consistent with a concept of geographic uniformity. *Moyses*, 186 U.S. at 190. In *Gibbons*, however, the Court applied "uniformity" in a non-geographical context, and held that private bankruptcy bills applicable to a single debtor are prohibited. In so holding, *Gibbons* followed an earlier case holding that uniformity requires that the law to be applied equally to all creditors and debtors. *Gibbons*, 455 U.S. at 469-71; *Blanchette v. Connecticut Gen.*

Ins. Corps., 419 U.S. 102, 160 (1974). If, as in *Gibbons*, uniformity means that all similarly situated debtors must be treated alike, the same should hold true for all similarly situated creditors – including States. *See* Lipson, *supra*, 78 WASH U. L. Q. at 1335.

None of these cases holds that Congress is prohibited from adopting a bankruptcy law imposing even greater uniformity by forbidding a creditor from opting out. Haines at 163-64. The Bankruptcy Clause is found in Section 8 of the Constitution, "Powers of Congress," not Section 9 on "Prohibited Powers." Haines at 167. Like the Necessary and Proper Clause, it is a grant of power instead of a limitation. *See McCulloch v. Maryland*, 17 U.S. 316, 419-20 (1819). Nor is the uniformity provision of the Bankruptcy Clause a restriction, like the uniformity language in the Constitution's taxing power provision. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes…but all Duties, Imposts and Excises shall be uniform….").

The Framers of the Constitution, by providing for the establishment of uniform bankruptcy laws, granted powers beyond mere legislative supremacy. Whenever federal and state laws are inconsistent, federal laws supersede state requirements under the Supremacy Clause, assuring legislative uniformity. U.S. CONST. art. VI, § 2. The bankruptcy uniformity provision necessarily means more than that, or it would be superfluous.

The FEDERALIST PAPERS explain that there is a sovereign immunity aspect to the Bankruptcy uniformity provision too. As this Court recognized in *Seminole Tribe*, Hamilton did not say that whenever Congress has legislative authority (*e.g.* in Article I), it can abrogate sovereign immunity. Rather, Hamilton explained in FEDERALIST NO.

81 that this would happen only in the rare circumstances referenced in FEDERALIST NO. 32. He thus distinguished between general Article I powers where the Supremacy Clause would override States' reserved legislative authority and specific instances when State sovereignty was completely "alienated." FEDERALIST NO. 81. The Naturalization powers he referenced, like those under the Bankruptcy powers found in the same clause, require that States accede to federal authority. Madison explained that States could not make their own, different decisions on qualifications for citizenship in the nation. FEDERALIST NO. 42. Likewise, States could not make their own, different decisions on whether a federally discharged debtor should be released from their state prisons, because, as Madison recognized, debtors and their property "may lie or be removed into different States," affecting the regulation of commerce and fraud. *Id.*

B. Bankruptcy Laws Were Intended to Be Enforceable Against the States.

TSAC and its *amici* argue that the Framers of the Constitution never intended to authorize bankruptcy discharge litigation against States, because bankruptcy laws of that era did not discharge debts owed to governments. The concept of discharge of indebtedness existed, however, although it was rarely included in bankruptcy and insolvency statutes. 48 States Br. at 16; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 203 (1819); *See* Mann *amicus* brief.

Whether debts held by governmental or individual creditors were discharged under any of the then-existing statutes is not the point; rather, the point is that *discharge of the debtor* from State debtors' prison was not only contemplated, but intended. The current Bankruptcy Code gives debtors a "fresh start," free of various types of debt.

Perez v. Campbell, 402 U.S. 637 (1971). In 1789, however, a bankruptcy discharge was profoundly bound up with the powers of the sovereign, rather than merely an issue between individual debtors and their creditors, because of debtors' prisons. Eighteenth Century bankruptcy and insolvency laws gave debtors freedom to leave or stay out of prison while paying their debts from their property and labors. *Sturges*, 17 U.S. at 203; *See* Mann *amicus* brief.

Most colonial and State insolvency relief laws were brief and limited, providing for release from imprisonment, often without a discharge from debt, and in some instances either assigning property to creditors or binding debtors in service to their creditors. Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence*, 22 AM. BANKR. INST. J. 42, 51-53, 79-80, 177-79 (Harvard U. Press 2002). Enactment of bankruptcy legislation was repeatedly attempted for eleven years before the first federal bankruptcy act was enacted in 1800. It provided for a discharge, not only of some debts but also of the person of the debtor from debtor's prison. *See id.*; Bankruptcy Act of 1800, Sess. I, Ch. 19, §§ 34, 38.

Thus, even without a statutory discharge of payment obligations to States, a federal bankruptcy discharge at the time of the Constitution directly conflicted with the sovereign authority of the States to punish and imprison debtors, and to impose their own terms for release. An effective, and uniform, federal law would have been impossible if the States could not be bound by the federal discharge. Only the States could give a federal discharge effect by releasing debtors from their prisons. Legislative preemption of state laws alone would have been insufficient to bind States to obey bankruptcy discharge orders.

Importantly, the means for enforcement of the federal discharge in the first federal bankruptcy act was a writ of *habeas corpus* operating directly against state jailers in their official capacities. If the bankrupt debtor were arrested after discharge on account of a prepetition debt, any federal judge in the district or the judgment court could issue a writ of *habeas corpus* ordering the state jailer to discharge the bankrupt. Act of 1800 § 38; Haines at 178. This was a direct infringement on State sovereignty. Contrary to the premise of sovereign immunity that the king can do no wrong, the writ of *habeas corpus* permitted a court to determine whether the king (or State) in fact did wrong by imprisoning a citizen without legal cause under the court's legal standards. Haines at 182.

When the Constitution was written, the federal writ enforcing a discharge from state debtors' prison would have been understood as an invasion of State sovereignty. The writ was served on a state prison official, but could not have been justified under an *Ex parte Young* immunity exception. *Ex parte Young* was not decided for another 100 years, and the "fiction" on which it is based was discredited in the Constitutional era, and did not provide a rationale for federal enforcement of a debtor's discharge against a state authority. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984) (*Ex parte Young* authority-stripping theory a "fiction"). Justice Marshall held the opposite of *Ex parte Young*: that when a State official was sued in his official capacity and had violated no law that would render him liable in a personal capacity, the State itself was considered a party on the record, and the federal court lacked jurisdiction under the Eleventh Amendment. *Governor of Georgia v. Madrazo*, 26 U.S. 110, 123-24 (1828).

Yet a federal discharge was enforced through *habeas corpus* as soon as the federal bankruptcy law debated for

years finally was enacted in 1800. This was a new provision, absent from the English counterpart law, and needed because of the unique federal and state dual sovereigns in the United States. Haines at 178-79. Statutory federal *habeas* jurisdiction over state prisoners outside of bankruptcy was not enacted until 67 years after it was authorized under the first bankruptcy act of 1800. Haines at 191. Bankruptcy was the only context at that time in which a federal court could order a State to discharge a prisoner who had violated a state law. The Bankruptcy Clause was accordingly intended to overcome state sovereign immunity. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (express consideration and resolution of difficult constitutional issues by the First Congress provides contemporaneous and weighty evidence of the Constitution's meaning).

C. Federal Bankruptcy Law, Enforceable Against States, Was Also a Solution for Divergent State Laws.

The *habeas corpus* remedy (and constitutional power to enact it) stemmed not only from the fact of debtors' prisons, but from the divergence of State insolvency laws and the interstate nature of significant indebtedness in the late 1700s. As TSAC and its *amici* have recognized, when the Constitution was drafted and ratified, delinquent debt was extensive and held across State borders. The economic impact of wars, accompanied by disruption of foreign trade, post-war contractions and consequent commercial risks, and the vagaries of business in an era before insurance, had led to economic declines and failures by merchants of integrity. *E.g.*, Mann at 55-57, 83-84, 102, 169-71, 176-77. The indebtedness was public as well as private, in part because States as well as Congress had issued bills of credit and loan certificates to purchase supplies and pay soldiers on the promise of paying interest or accepting certificates in

payment of taxes. *Id.* at 169-70. Speculation in public debt by investors was rampant. *Id.* at 175-76. Before the federal bankruptcy law, several of the States enacted their own versions of bankruptcy or insolvency relief to address the massive problem. *Sturgis*, 17 U.S. at 203.

> Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, *questions were raised as to whether one State had to recognize the relief given to a debtor by another State.* Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers *sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States.*

Gibbons, 455 U.S. at 472 (internal citations omitted) (emphasis added); *see* Mann at 51-53, 55, 59-61, 79, 177-80, 183. If States continued to have immunity after ratification, the Constitution's grant of power to Congress to create a uniform bankruptcy system, *enforceable among the States*, would have been meaningless.

Professor Mann explains in his *amicus* brief why key delegates to the constitutional convention were aware of the difficulty in applying State insolvency and bankruptcy laws

to debtors and creditors who lived in other States, and why they recognized the value of addressing the issue at the national level. The conclusion to be drawn from his historical analysis is that the concept of a uniform bankruptcy law is comparable to the uniform naturalization laws to which Hamilton referred in THE FEDERALIST. Under the Constitution's federal system, citizens were citizens of the nation. No State government could refuse to recognize a person's national citizenship, and no State government could imprison a bankrupt person or refuse to recognize his bankruptcy discharge in the face of contrary federal law. For the States to be permitted to flout federal bankruptcy authority would have been "contradictory and repugnant" to the Constitutional scheme. Yet if this Court reverses the Court of Appeals for the Sixth Circuit, States will indeed be permitted to flout federal bankruptcy authority, and scuttle the uniformity requirement of the Constitution.

CONCLUSION

States as creditors have an enormous impact on bankruptcy proceedings and on the rights of debtors as well as other creditors. If bankruptcy courts are unable to affect States' claims without their consent in each case, thus giving States the ability to "opt out" of the federal bankruptcy system, that system is seriously threatened in a variety of ways, including:

- Impeding the fresh start promised by the Bankruptcy Code – one of the Code's "primary purposes." *See, e.g., Perez*, 402 U.S. at 648 (1971).

- Frustrating fairness to creditors, and "a ratable distribution of assets among the bankrupt's creditors" – additional primary purposes of federal bankruptcy

law. *Vanston Bondholders*, 329 U.S. at 161; *Gardner*, 329 U.S. at 577.

- Hampering the "orderly and expeditious" resolution of estates – yet another "fundamental purpose" of the bankruptcy system, *Irving Trust*, 288 U.S. at 333 – and allowing States to "pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals," thus "seriously impair[ing] the power of the court to administer the estate." *Gardner*, 329 U.S. at 577.

Binding State creditors to bankruptcy determinations of core issues in the *in rem* proceedings over their debtors is not only constitutional, but sound and appropriate. The 1.5 million debtors who file for bankruptcy each year, most of whom owe debts of one kind or another to States, are entitled to receive both uniform and predictable treatment of their claims. They are entitled to a prompt federal determination of their rights to hardship discharges of their student loan debts, that cannot be frustrated and indefinitely delayed by a State's choice to offset tax refunds, garnish wages and otherwise opt out of the federal bankruptcy courts. This Court should affirm the *Hood* decision for the reasons set forth by the Debtor Respondent and in this brief.

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December 26, 2003